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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner

V.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the State of Georgia must demonstrate a compelling state interest in the face of a constitutional challenge to a criminal sodomy statute?

CONSENT OF THE PARTIES

The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Jewish Congress, which was founded in 1918, is a membership organization of American Jews dedicated to the protection of the civil liberties of all Jews and of all Americans. Among their many activities directed to these ends, the American Jewish Congress has in the past filed amicus curiae briefs in most of the significant cases where there is a serious challenge on Constitutional grounds of government interference with the fundamental rights guaranteed citizens by the Bill of Rights.

In addition to many other concerns, the American Jewish Congress opposes legislation that interferes with the liberty of an individual to exercise his or her own conscience in the conduct of his or

her personal life, free of unwarranted government intrusion. States should not interfere with the right of an individual to determine the course of his or her life, with the burden on the government to demonstrate its overriding compelling needs. Moreover, American Jewish Congress is on record opposing discrimination against homosexuals in housing, employment, and other areas.

Jewish law unambiguously forbids homosexual acts. The Amicus, a Jewish organization, is not filing this brief because it believes that homosexuality is, from a Jewish religious perspective, acceptable sexual preference. However, American Jewish Congress believes that before government may regulate intimate sexual association occurring in the privacy of the home, it must demonstrate a compelling justification

of public needs, not merely a demonstration by the legislature of the moral beliefs of a majority of the voters.

This present case involves a law of the State of Georgia regulating sexual behavior between consenting persons, irrespective of their marital status, whether they are heterosexual or homosexual, irrespective of their minor or majority status, and irrespective of the location of the prohibited sexual activity. It is a sweeping law which is overly broad on its face, allowing -- as in the application of the present case -- the intrusion of state authorities into a private citizen's bedroom to assess the nature of the sexual activites within. The risks of unbridled governmental power in the private lives of our citizens is a serious challenge to basic freedoms of privacy. Amicus believes that such governmental intrusion into the

"private realm" requires the state to demonstrate "a compelling state interest."

In addition, the state's brief suggests that the sweeping range of the statute is acceptable because of its key purpose in regulating principally homosexual practices, practices which the state maintains are abhorrant to historic and contemporary religious codes of morality. Unequal application of the statute does not make it constitutionally more acceptable, and the potential use of a criminal statute for harrassment of individuals due to their sexual preference has been a concern to the American Jewish Congress.

STATEMENT OF THE CASE

Michael Hardwick was arrested in his home on August 3, 1982, and charged by the Atlanta police under Georgia statute 16-6-2 (1984) for committing a prohibited sexual act with a consenting adult in his bedroom. The Georgia Sodomy Act criminalizes any sexual act involving the sex organs of one person and the mouth or anus of another. The penalty for the offense applies to all persons, whether single or married, heterosexual or homosexual. The prohibited sexual acts are punishable by one to twenty years of prison. The District Attorney has not requested an indictment from the Grand Jury, but has also not dismissed the case. Under the statute of limitations, the District Attorney may take the case to the Grand Jury at any time up to four years.

Hardwick sued the State of Georgia, the District Attorney, and the Attorney General in the U.S. District Court for the Northern District of Georgia, challenging the statute on its face.

John and Mary Doe, a married heterosexual couple, who feared prosecution under the same statute, filed a complaint in the Federal District Court seeking a declaratory judgment that O.C.G.A. 16-6-2 (1984) applied to private sexual conduct between consenting adults was unconstitutional.

The District Court ruled that Hardwick had standing to sue, but that the Does did not have standing. The District Court dismissed Hardwick's complaint on the grounds that his constitutional claims had been rejected by the Supreme Court in Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 90 (1976), aff'g 403

F.Supp. 1199 (E.D.Va 1975).

Hardwick appealed to the U.S. Court of Appeals, Eleventh Circuit. That Court found that Hardwick did have sufficient standing to sue, while the Does did not; that the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney, supra, was not binding precedent; and that the Georgia sodomy statute infringed upon fundamental constitutional rights of the plaintiff. The Court of Appeals ruled that the constitution prevents states from unduly interfering in certain individual decisions critical to personal autonomy because the decisions are essentially private. The Court of Appeals ordered the case remanded, and ruled that, in order for Georgia to enforce the statute, Georgia must demonstrate a compelling interest in restricting those rights, and must also demonstrate that the statute was a properly

restrained method of safeguarding its interests.

The State of Georgia filed a writ of Certiorari to the Supreme Court and the writ was granted November 4, 1985.

ARGUMENT

INTRODUCTION

In the decision below, the United States Court of Appeals for the Eleventh Circuit determined that the Georgia criminal sodomy statute, O.C.G.A. 16-6-2, infringed upon fundamental rights. The Court of Appeals remanded the case to the district court to determine whether the State of Georgia had a compelling justification for the statute. Hardwick v. Bowers, 760 F.2d 1202, 1211 (11th Cir. 1985). Because the Georgia statute as enforced intrudes broadly on the right of privacy traditionally attached to the home and on the right of private intimate association, the decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

The question before the Court is not the validity of the Georgia statute, but rather

whether the statute should be subject to heightened judicial scrutiny. There will be ample opportunity before the trial court on remand for the State of Georgia to show that its statute has specific compelling justifications, if indeed it does.

The Court of Appeals' conclusion that the statute should be subject to heightened scrutiny was warranted by the sweeping scope of the statute and by the broad way in which the statute could be enforced. The statute is not aimed merely at protecting minors, or at preventing sexual acts that were not consented to, nor is it aimed merely at regulating sexuality in public bathhouses and bars, or at the public promotion of a particular kind of lifestyle. The statute is much broader, reaching actions which occur in private bedrooms between consenting adults, and reaching a person's intimate association

with another. Amicus believes that the Constitution and this Court's decisions require the State of Georgia to offer special justifications if it is to regulate even quintessentially private matters that occur in quintessentially private places.

I. THE COURT BELOW CORRECTLY CONCLUDED THAT STATE ACTION INTRUDING ON MATTERS OF SEXUAL INTIMACY IS SUBJECT TO HEIGHTENED JUDICIAL SCRUTINY UNDER THE FOURTEENTH AMENDMENT.

The principles underlying the Constitution's guarantees of privacy were summarized by Mr. J. Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478.

> The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a

> part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.

The Supreme Court has clearly recognized a realm of "private belief and action which is free from unwarranted state intrusion." The Court has held that citizens shall retain the liberty -- that has come to be know as the "right of privacy" -- to conduct their personal lives with dignity and without unwarranted State interference. The States may not infringe upon personal liberty unless the State demonstrates that, in so doing, the state narrowly serves "a subordinating interest which is compelling". Bates v. City of Little Rock, 361 U.S. 516, 524; Griswold v. Connecticut, 381 U.S. 479, 485 .

A. STRICT SCRUTINY APPLIES TO GOVERNMENT INTRUSION INTO AREAS OF SEXUAL INTIMACY.

Several decisions of the Supreme Court make clear that decisions pertaining to marriage, family life, and sexual intimacy are protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, 388 U.S. 1, 12; Griswold v. Connecticut, supra; Pierce v. Society of Sisters, Meyer v. Nebraska, 262 U.S. 390, Prince v. Massachusetts, 321 U.S. 158, 166; Skinner v. Oklahoma, 316 U.S. 535, 541, Roe v. Wade, 410 U.S. 113.

In Griswold v. Connecticut, supra , seven Justices of the Court agreed, albeit on varying constitutional grounds, that a law forbidding the use of contraceptives as a birth control measure was an unwarranted interference with individual liberty because it prevented married and unmarried

individuals from determining for themselves the personal question whether or not or when to have children.

The opinion of the Court in Griswold, 381 U.S. at 479-486 , traced the development of the constitutional concept of the sanctity of the individual and determined that the right of privacy is derived from the "penumbras" of the "specific guarantees in the Bill of Rights...formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. The concurring opinions in Griswold stressed that the Ninth and Fourteenth Amendments to the Constitution contemplate a reservoir of unspecified personal rights now encompassed in the term "right of privacy" that the people had not delegated, and should never

be compelled to delegate, to a state or the federal government.*

An anti-miscegenation statute was held unconstitutional in Loving v. Virginia, 388 U.S. 1, 12, (1967) because the state deprived the defendants of the freedom to marry or not marry a person of another race.

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* Publius , author of The Federalist, observed that the Constitution as originally drafted, before the adoption of the first ten Amendments, "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist, No. 8 (Hamilton) at 561 Mod. Lib. Ed., 1933 (capitals in the original). "Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations... 'WE THE PEOPLE of the United States, to secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of ...aphorisms...which would sound much better in a treatise of ethics than in a constitution of government.

"But a minute detail of particular rights is certainly far less applicable to

In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court recognized the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision of whether to bear or beget a child. The Supreme Court's decisions in Carey v. Population Services International, 431 U.S.678 (1977) and Eisenstadt v. Baird, supra, make it clear that there is a right of sexual privacy which must be free from unwarranted government intrusion. In Roe v. Wade, the Court recognized the right of women to determine whether or not to have an abortion. 410 U.S. 113 (1973).

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to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns." Ibid at pp. 558-559 (Emphasis in the original).)

Well entrenched within our legal history, codified in our Constitution, and affirmed in the Supreme Court's decisions is the proposition that the Government must show special deference and must have compelling justifications when it chooses to intrude into the most private realms of its citizens' lives.

B. STRICT SCRUTINY APPLIES TO GOVERNMENT INTRUSION IN THE HOME.

The Supreme Court's past decisions reflect the fact that rights of sexual expression and sexual intimacy depend to a unique degree upon where the activities in question occur. For example, the Court has held that the legitimacy of regulating the viewing of sexual materials depends on the location of such viewing. See Paris Adult Theatre I v. Slaton ,413 U.S. 49,65-67

(1973); Stanley v. Georgia, 394 U.S. 557, 564-68 (1969). Similarly, it is clear that, while the state may not forbid the sexual relations of a married couple in the privacy of their home, it may forbid the same couple from being "locked in a sexual embrace at high noon in Times Square." Paris Adult Theatre I. supra at 67. In another case dealing with sexual materials, the Court noted: "The Constitution extends special safeguards to the privacy of the home...It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public. United States v. Orito , 413 U.S. 139, 142-43 (1973).

A citizen has a right to protection in an area where there is a reasonable expectation of privacy. Katz v. U.S. 398 U.S.347 (1967). There is no more

reasonable place than the home.

"[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, 445 U.S. 573, 601 (1980) (footnote omitted). As recently as last Term, this Court reaffirmed "that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required..." Winston v. Lee , ___U.S.___. 105 S.Ct. 1611, 1620 (1985).

This case does not require the Court to determine the "outer limits" of the realm of personal freedom and autonomy guaranteed by the Constitution. This case threatens the very heart of the domain of privacy.

II. A LEGISLATIVE PURPOSE OF PROHIBITING HOMOSEXUAL SODOMY CANNOT JUSTIFY A FAILURE TO APPLY STRICT SCRUTINY TO THE STATUTE.

A. STRICT SCRUTINY IS NECESSARY BECAUSE THE STATUTE PROHIBITS CONDUCT OTHER THAN HOMOSEXUAL SODOMY.

This statute makes criminal a broad range of sexual activity and provides for such activity a penalty of one to twenty years in jail.

Even if homosexual sodomy was a crime which could be prohibited in a statute which could escape strict scrutiny, this statute goes well beyond the prohibition of only homosexual sodomy and on that basis, must be subject to strict scrutiny.

B. STRICT SCRUTINY APPLIES EVEN IF THE STATUTE WAS APPLICABLE ONLY TO HOMOSEXUAL SODOMY.

In effect, the State of Georgia -- in its justification for this sweeping statute on the grounds of alledged uniform

disapproval of homosexuality -- has conceded that it intends to enforce this statute selectively.

At a minimum, heightened judicial scrutiny means that Georgia cannot justify this regulation simply by asserting that certain kinds of consensual adult sexual practices are so clearly and self-evidently evil that no further justification is required. The trend towards decriminalization of consensual adult sexual practices makes any such claim untenable. As the State of Georgia concedes, "22 states have legislatively decriminalized homosexual sodomy." Petitioner's Brief at 23.

These changes in legal thinking among the state legislatures have occurred largely since the time, over twenty years ago, when admittedly, some Justices seemed to take for granted the government's

authority to outlaw certain homosexual acts. See Poe v. Ullman , 367 U.S. 497, 553 (1961) (Harlan, J., dissenting); Griswold v. Connecticut , 381 U.S. 479, 499 (1965) (Goldberg, J., concurring). That a particular attitude towards a particular activity has had a long history of general acceptance has never before meant that this Court was bound to defer to that attitude in the face of evolving standards and norms. Cf . Loving v. Virginia , 388 U.S. 1 (1967); Brown v. Board of Education , 347 U.S. 483 (1954). Last Term, the Supreme Court adopted a similar structure of analysis once again in its discussion of the use of deadly force to apprehend fleeing felons. The Court noted that there had been a "long-term movement... away from the rule that deadly force may be used against any fleeing felon..." Tennessee v. Garner , ___U.S.___. 105 S. Ct. 1694, 1705 (1985).

The issues before the Court in the case at bar do not require a finding that Georgia cannot constitutionally legislate a criminal prohibition of homosexual sodomy. This issue will undoubtedly be raised in the proceedings which will follow. However, the trend among the states does make it impossible for the State of Georgia to maintain plausibly that the acts it would outlaw, even in private and among consenting adults, are so transparently evil as to make a demand for further justification pointless, or otherwise inappropriate.

CONCLUSION

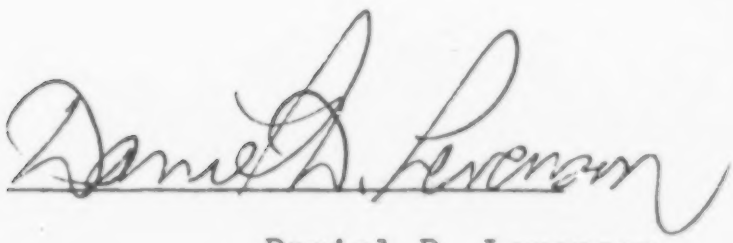
There is a public domain where the community must wrestle with questions of public morality. But there is a private sphere where the costs to our individual freedom from state intrusion can only be allowed for the most compelling of state interests, if at all. Although not an issue before the Court at this time, it is unlikely that Georgia will be able to demonstrate such a compelling interest in the regulation of private sexuality between consenting adults in private homes, even if such sexuality is homosexual sodomy.

In Roe v. Wade, supra Mr. Justice Blackmun reminded the Court of the admonition of Mr. Justice Holmes "now-vindicated dissent in Lochner v. New York, 198 U.S. 45, 76 (1905):

> (The Constitution) is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the quesion whether statutes emboying them conflict with the Constitution of the United States.

For the above stated reasons, the judgment below should be affirmed.

Respectfully submitted,



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